UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

MICHELE R. FREADMAN, Plaintiff,	:	
v.	:	CA 01-628ML
METROPOLITAN PROPERTY AND CASUALTY INSURANCE COMPANY, Defendant.	:	

REPORT AND RECOMMENDATION

David L. Martin, United States Magistrate Judge

Before the court is the Motion for Summary Judgment (Document #45) ("Motion" or "Motion for Summary Judgment") of Defendant Metropolitan Property and Casualty Insurance Company ("Defendant," "Metropolitan," or "Company"). Plaintiff has filed an objection (Document #63) to the Motion. The Motion has been referred to me for preliminary review, findings, and recommended disposition pursuant to 28 U.S.C. § 636(b)(1)(B) and D.R.I. Local R. 32(a). After listening to the arguments presented, reviewing the memoranda and exhibits submitted, and performing independent research, I recommend that the Motion be granted.

I. Overview

This is an employment discrimination case. Plaintiff Michele R. Freadman ("Plaintiff," "Michele," or "Freadman") alleges that she was the victim of disability discrimination and retaliation by her former employer, Metropolitan. She contends that Metropolitan discriminated against her by failing to provide her with reasonable accommodation for her ulcerative colitis and by subjecting her to disparate treatment. She also alleges that Defendant retaliated against her for seeking reasonable accommodation.

The failure to provide reasonable accommodation allegedly

occurred after she returned from medical leave in July, 1999, and in March and June of 2000. The retaliation allegedly occurred in July, 1999, and June, 2000.

As explained herein, Plaintiff has failed to show that the requests for accommodation which she made in connection with her return to work in July, 1999, were reasonable and that they were linked to her disability. She has also failed to rebut Defendant's showing that granting the requests would impose an undue hardship on Metropolitan. With regard to the request(s) which she made in March, 1999, Plaintiff has failed to show that any request was denied, or if it was denied, that the request was reasonable and that it was linked to her disability. As for the requests for accommodation which were made in June, 2000, Plaintiff has failed to show that they were sufficiently direct and specific and linked to her disability to constitute requests for accommodation.

Additionally, with regard to her claims based on disparate treatment, Plaintiff has failed to show that she suffered an adverse employment action after she returned to work in July, 1999, and that the employment action was taken, in whole or in part, because of her disability. Her disparate treatment claims based on the change in her duties in June, 2000, fail because she cannot show a causal connection between this employment action and her disability.

Lastly, Plaintiff's claims of retaliation based on the change in her duties which occurred in July, 1999, fail because she cannot show that the change constituted an adverse employment action. Her claims of retaliation based on the change of duties which occurred in June, 2000, are barred because she cannot show that she engaged in protected activity as her requests for accommodation were not sufficiently linked to her disability and she cannot show a casual relationship between any protected

activity and the adverse action.

II. Determining Undisputed Facts

Pursuant to Local Rule 12.1(a)(1), Defendant filed its statement of undisputed facts. See D.R.I. Local R. 12.1(a)(1); see also Defendant Metropolitan Property and Casualty Insurance Company's Statement of Undisputed Material Facts in Support of Defendant's Motion for Summary Judgment (Document #46) ("SUF"). Defendant's SUF contains fifty enumerated paragraphs. In response, Plaintiff filed her statement of material facts as to which she contends there is a genuine issue necessary to be litigated, listing forty-two such facts. See D.R.I. Local R. 12.1(a)(2); see also Plaintiff Michele Freadman's Statement of Disputed Facts in Support of Plaintiff's Objection to Defendant's Motion for Summary Judgment (Document #65) ("SDF"). The numbering of Plaintiff's disputed facts did not correspond to the numbering of Defendant's undisputed facts. This made it difficult to readily determine whether a particular fact, which Defendant claimed was undisputed, was disputed by Plaintiff.

To eliminate this problem, the court directed Plaintiff to file a supplemental statement of disputed facts. See Letter from Martin, M.J., to Andrews and Mann of 3/23/04. Plaintiff was instructed to address in the supplemental statement each numbered paragraph of Defendant's SUF and to state whether the facts alleged in the paragraph were "Disputed" or "Undisputed." Id. If the facts were disputed, Plaintiff was further instructed to identify specifically the numbered paragraph(s) of Plaintiff's SDF wherein Plaintiff had disputed the facts alleged. See id. Plaintiff was advised that "[t]he purpose of this exercise is not to provide Plaintiff with a second opportunity to dispute facts, but only to assist the court in identifying which paragraphs of Defendant's [SUF] are, in fact, disputed by Plaintiff." Id. At the hearing on the Motion, the court asked Plaintiff's counsel if

they understood what the court was seeking and received an affirmative response. See Tape of 3/23/04 hearing.

The supplemental statement of disputed facts which Plaintiff filed went well beyond the court's directive. See Plaintiff's Supplemental Statement of Material Disputed Facts (Document #73) ("Supp. SDF"). In additional to indicating that twenty-five of the fifty paragraphs of Defendant's SUF were disputed, either in whole or in part, Plaintiff included extensive citations to the record to support her contention that the facts in these paragraphs were disputed. See Supp. SDF at 1-21. Defendant objected to Plaintiff's Supp. SDF, describing it as a "sur-reply brief after having had the benefit of hind sight [sic] and oral argument." Letter from Murray to Martin, M.J., of 4/13/04 at 2. Defendant requested that the court either disregard or strike it or permit Defendant to respond to "Plaintiff's arguments and new factual assertions." Id. The court declined to allow Defendant to file a response to Plaintiff's Supp. SDF, see Letter from Martin, M.J., to Murray of 4/15/04, but stated that, to the extent that Plaintiff's Supp. SDF contained information exceeding that which the court had requested, the information would be disregarded, see id.

Although Plaintiff apparently believes that her original SDF disputed, in whole or in part, twenty-five paragraphs of Defendant's SUF, see Supp. SDF at 1-22, the court does not find that this is so. In a number of instances the paragraph(s) of Plaintiff's SDF, which Plaintiff claims dispute particular facts stated in Defendant's SUF, do not support that contention.[1] In

[1] For example, Plaintiff's Supp. SDF states that Defendant's SUF ¶ 4 is "Disputed," Supp. SDF at 3, and indicates that Plaintiff disputed Defendant's SUF ¶ 4 in Plaintiff's SDF ¶¶ 27, 28, 38, and 39. However, these paragraphs of Plaintiff's SDF do not contradict the facts stated in Defendant's SUF ¶ 4. Moreover, the information in Defendant's SUF ¶ 4 is taken directly from Plaintiff's answer to Interrogatory No. 7. See SUF ¶ 4; Plaintiff's Answers to

such instances, the court deems the facts as stated by Defendant in the SUF to be admitted unless they are controverted by affidavits filed in opposition to the Motion or other evidentiary materials which the court may consider under Rule 56, see Local Rule 12.1(a), and Plaintiff has directed the court's attention to such materials in her filings prior to the Supp. SDF.[2]

III. Facts

Prior to March 1999

Plaintiff was hired by Metropolitan in January of 1993. See Complaint ¶ 11. She was promoted to manager in 1995. See id. ¶ 12. In September 1998, she was promoted again. See Affidavit of Michele Freadman ("Plaintiff's Aff.") ¶ 5. As a result of this promotion, Plaintiff was given more prestigious office space and her duties and responsibilities were expanded to include managing three core functions: training, compliance, and performance enhancement. See Plaintiff's Aff. ¶ 6; see also Complaint ¶ 14.

Interrogatories ("Ans. No.") 7 at 46-48. Thus, there is no basis for Plaintiff's contention that Defendant's SUF ¶ 4 is "Disputed." Supp. SDF at 3.

As another example, Plaintiff's Supp. SDF states that she "Disputed" Defendant's SUF ¶ 12. See Supp. SDF at 7. The paragraph of her SDF which Plaintiff cites as evidencing that she disputed Defendant's SUF ¶ 12 does not, in fact, dispute SUF ¶ 12. See Supp. SDF at 7 (citing SDF ¶ 19). The court again finds no basis for Plaintiff's contention that Defendant's SUF ¶ 12 is "Disputed." Supp. SDF at 7. Defendant's SUF ¶ 12 fairly states Plaintiff's deposition testimony. See SUF ¶ 12 (citing Plaintiff's Dep. at 49).

[2] Plaintiff's forty-one page memorandum contains repeated citations to the Affidavit of Michele Freadman ("Plaintiff's Aff.") and the Affidavit of Jacqueline L. Wolf, M.D. ("Wolf Aff."). See Plaintiff's Revised Memorandum in Support of her Objection to Defendant's Motion for Summary Judgment (Document #69) ("Plaintiff's Mem.") at 1-2, 4, 6, 14-15, 20, 28, 30. However, Plaintiff's memorandum does not specify where in the affidavits the cited statements can be found. Although the court has considered the information in these affidavits, citations to multi-page documents should include either the page or the paragraph number where the cited statements appear. Also, affidavits and other documents which are submitted to the court should be printed in at least size 12 font. The affidavit of Dr. Wolf appears to be printed in size 11 font.

These duties were in addition to her previous responsibilities of managing the "Instrument Panel," Complaint ¶ 14, a periodic newsletter which tracked how the Company was doing in terms of meeting certain goals and objectives, see Tape of 3/24/04 hearing.

Plaintiff reported to Assistant Vice-President Robert Smith ("Smith"). See SUF ¶ 5. At the time of her promotion in September of 1998, Smith told Plaintiff that people in the Company thought highly of her, that she had a bright future, and that she stood a very good chance of making officer. See Plaintiff's Aff. ¶ 5.

March to July 1999 (Medical Leave)

In March, 1999, Plaintiff became seriously ill with ulcerative colitis and was hospitalized from March 17, 1999, to April 23, 1999. See Complaint ¶¶ 15-16. In May, while Plaintiff was convalescing at home, she was visited by Smith. See SUF ¶ 8; see also Plaintiff's Answers to Interrogatories, Answer to Interrogatory No. ("Ans. No.") 13 at 62. During this visit and also in telephone calls, Plaintiff told Smith that she needed to work less hours, have fewer last-minute, time-driven assignments delegated to her, and have adequate staff and a better balance between her work and her personal life.[3] See Plaintiff's Aff. ¶ 8; see also SUF ¶ 8; Complaint ¶ 21; Plaintiff's Deposition ("Plaintiff's Dep.") at 45.[4] Smith agreed with Plaintiff's

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[3] Plaintiff contends that these statements constituted her first request for an accommodation. See Plaintiff's Mem. at 29-30; Plaintiff's Aff. ¶ 9.

[4] At her deposition, Plaintiff described the telephone calls with Smith:

> A. We talked about my illness being ulcerative colitis, and my return to work, that I would need certain changes in order to stay healthy.
>
> Q. Okay. What was said about those changes?

request for a better work/life balance and told Plaintiff that she worked too hard. See SUF ¶ 9; Plaintiff's Dep. at 46.

July 1999 to May 2000

After a four month medical leave due to her ulcerative colitis, Plaintiff returned to work on a part-time basis on July 15, 1999.[5] See Plaintiff's Aff. ¶ 12; Complaint ¶ 24; SUF ¶¶ 7, 15. Plaintiff learned that her training, compliance, and performance enhancement duties had been reassigned to other employees. See Plaintiff's Aff. ¶ 12. She was given a new project entitled "Ease of Doing Business" which was headed by Smith's boss, Chris Cawley ("Cawley"). See SUF ¶ 13. Cawley was a senior vice-president. See Cawley Dep. at 7. Although Plaintiff had expected Smith to make changes in her job responsibilities in response to the comments which she had made to him in May, see SUF ¶ 12; Plaintiff's Dep. at 49, Plaintiff was concerned about the removal of her core functions of training, compliance, and performance enhancement, see Plaintiff's Dep. at 58. She was left with the Instrument Panel and the Ease of Doing Business Project ("Ease of Doing Business" or "EDB Project"), both of which were temporary rotational assignments, see Plaintiff's Aff. ¶ 13. The EDB Project at the time was "a little-known, low-profile project." SDF ¶ 21; see also Plaintiff's Dep. at 57. Consequently, Plaintiff was concerned that as a result of the reassignment she "may not have

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> A. Reasonable hours, less last minute time driven assignments, work/life balance, being able to exercise, having adequate staff.

See Plaintiff's Deposition ("Plaintiff's Dep.") at 45.

[5] Part-time work was not normally available for managers, but Metropolitan allowed Plaintiff to do so for several weeks. See SUF ¶ 15.

the same [job] security as [she] had before," Plaintiff's Dep. at 58, in the event of layoffs or company downsizing, see id.

Within a few weeks, Plaintiff resumed full time work. She again began working long hours, including nights and weekends on a consistent basis. See Complaint ¶ 28. Although Smith did not require Plaintiff to work nights or weekends, see SUF ¶ 9, Plaintiff found it necessary to do so in order to meet the requirements imposed on her by Smith and Cawley, see Complaint ¶ 28. According to Plaintiff, there were more and tighter deadlines, and she continued to have inadequate resources, including at times an inadequate staff. See id.; SDF ¶ 17. While Smith told Plaintiff to work less and to take time off, SUF ¶ 6, Plaintiff contends that the high pressure projects which Smith gave her made it impossible for her to do so, see SDF ¶ 37. Similarly, although Smith told her that it was "okay to do a B job instead of an A job," SUF ¶ 6, and to "[m]ake sure you go to exercise," Plaintiff's Dep. at 180, Plaintiff did not consider such statements "meaningful," id. at 181, because of the assignments she was given and the short time frames within which to complete them, id.

Plaintiff perceived that she was treated differently after she returned from medical leave. See Complaint ¶ 29. Smith no longer called her a "star," Ans. No. 6 at 39, as he had before her illness, see id. at 40, and he no longer told Plaintiff that she was on track for promotion, see id. at 39. Prior to becoming ill, Smith had told Plaintiff that company officers recognized and respected her abilities and that her career would be upwardly mobile. See id. at 40. However, when Plaintiff inquired of Smith, almost eleven months after returning from medical leave, as to what it took to become an officer, Smith replied that "You are not on any list that I know of." Ans. No. 6 at 40. Plaintiff felt that she was not afforded appropriate career

development and coaching. See id. at 41.

Plaintiff also believed that she "did not receive the appropriate level of respect and encouragement after [she] returned from disability leave in mid-July 1999." Id. at 37. In her view, Smith and Cawley were not supportive and treated her with disrespect and disdain. See id. at 38. Cawley allegedly often communicated with Plaintiff in a rude and inappropriate manner and often refused to respond to her e-mails. See Complaint ¶ 31.

Around March, 2000, one of Plaintiff's subordinates, Susan McGuirken[6] ("McGuirken"), left the Company. See Plaintiff's Dep. at 64, 66. When Plaintiff spoke to Smith about a replacement, he told her to "hire somebody." Id. at 67. Shortly thereafter, Smith asked her if she had hired anyone. See id. Plaintiff answered that she "may have given an offer to somebody ...." Id. Smith told Plaintiff that if she had not given an offer, she should not do so because Cawley had denied the replacement. See id. Smith explained that Cawley thought the home office was getting too big. See id. at 67. Plaintiff protested: "But, Bob, I'm basically killing myself to keep this on track, and I'm going to get sick again." Id. Smith allegedly responded that he knew this and agreed that Plaintiff could hire a replacement, telling her to "[j]ust do it quick." Id.

A few days later, Smith again asked Plaintiff if she had extended the offer. See id. Plaintiff answered affirmatively. See id. Smith indicated that if Plaintiff had not already extended the offer he was going to tell her "to hold on it because Chris [Cawley] said the office is getting too big." Plaintiff's Dep. at 67. Plaintiff responded by saying: "But,

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[6] Susan McGuirken's name is spelled in the record both as "McGuirken," see Plaintiff's Dep. at 64, and "McGurkin," see Plaintiff's Aff. ¶ 11.

Bob, we just added 10 people to [the] home office. Isn't this a critical initiative? I can't possibly keep this project on track without the extra help, and without getting sick." Id. at 67-68. Smith allegedly replied: "I know. I know." Id. at 68.[7] The net result of these conversations was that Plaintiff hired Robin Sylvia ("Sylvia") to replace McGuirken, and Sylvia worked for Plaintiff until Plaintiff went on leave in June of 2000. See id.

In May, 2000, Plaintiff was asked to give a presentation on Ease of Doing Business at a strategic planning session for officers on June 9, 2000. See SUF ¶ 25. Plaintiff was under the supervision and control of Cawley for the EDB Project, and he had the authority to make changes in her presentation. See id. In an e-mail dated May 31, 2000, Plaintiff asked Cawley for his input on her presentation. See id.

June 2000

In early June, 2000, Plaintiff's ulcerative colitis again became active, and Plaintiff began suffering a recurrence of her illness and related symptoms. See Complaint ¶ 36. Plaintiff had been almost symptom free since July, 1999.[8] See id.

Conversation with Smith on June 2

During a meeting on June 2, 2000, Plaintiff advised Smith that she was working too hard and that she needed to take some time off because she was not feeling well.[9] See Ans. No. 11 at

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[7] Plaintiff contends that her statements to Smith in March constituted her second request for an accommodation. See Plaintiff's Aff. ¶ 9.

[8] Plaintiff, however, states in her afffidavit that on or about "July 15, 1999, when I returned to work, I developed C-dificile again and was treated with antibioditics. I had to remain on this medication for 2-3 weeks and had diarrhea almost on an hourly basis in the acute phase." Plaintiff's Aff. ¶ 18.

[9] Smith denies that Plaintiff told him that she was sick prior to the June 9, 2000, presentation. See Smith Dep. at 156-57. He does remember a conversation in which Plaintiff expressed some concern or nervousness about making a presentation in front of the CEO and the

56; Ans. No. 13 at 64. Plaintiff did not tell Smith that she was suffering the symptoms of colitis, see SUF ¶ 40; see also Plaintiff's Dep. at 72, but Plaintiff maintains that Smith was aware of her medical condition, see SDF ¶¶ 9-10, and that Smith knew that she was ill prior to the June 9 presentation, see SDF ¶ 42. Similarly, although Plaintiff never told Cawley that she was feeling ill prior to the presentation, see SUF ¶ 40; see also Plaintiff's Dep. at 74-75, she contends that he knew she ill, see SDF ¶ 42.

Meeting with Cawley on June 7

On June 7, 2000, Cawley stopped by Plaintiff's cubicle with Smith to look at Plaintiff's presentation. See SUF ¶ 26. Cawley reviewed the materials and was critical of the slides Plaintiff proposed to use and told her to shorten the presentation. See id. According to Cawley, he also told Plaintiff not to do breakout sessions, see Cawley Dep. at 156-57, 165, but Plaintiff disputes this, see SUF ¶ 31. In any case, Plaintiff believed the criticism was unjustified, see SDF ¶ 24; see also Plaintiff's Dep. at 243, and was not receptive to Cawley's comments, see SUF ¶ 27. Plaintiff described the meeting with Cawley as "a very upsetting, intense period ...." Plaintiff's Dep. at 241. Lyndalu Pieranunzi ("Pieranunzi"), who was present, stated that there was some tension between the two. See Pieranunzi Dep. at 39.

Plaintiff began to ask Cawley what she should take out, and he told Plaintiff it was her job to decide what slides to cut. See SUF ¶ 28. Plaintiff tossed her presentation on the desk and told Cawley to tell her what to take out. See SUF ¶ 28;[10] see

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officer group. See id. at 157.

[10] Although Plaintiff states in her Supp. SDF that she "Disputed" Defendant's SUF ¶ 28, see Supp. SDF at 13, and indicates this disputation is reflected in Plaintiff's SDF ¶¶ 24, 30, see Supp. SDF ¶

also Cawley Dep. at 158-159.[11] Smith characterized Plaintiff's attitude as belligerent. See SUF ¶ 29; see also Smith Dep. at

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13, the court does not find this to be the case. Even assuming Plaintiff's SDF ¶ 24 refers to Cawley's actions on June 7 (and not, as it appears, his actions on and after June 9), at most the only "fact" disputed in Plaintiff's SDF ¶ 24 is whether Cawley's criticism of Plaintiff was justified. Similarly, the only "fact" disputed by Plaintiff's SDF ¶ 30 is that Cawley told Plaintiff not to do breakout groups, and this "fact" is not stated in Defendant's SUF ¶ 28.

Even if the court were to consider the additional statement in Plaintiff's Supp. SDF that "Pieranunzi disputes that Freadman threw her presentation towards Cawley," Supp. SDF at 13, the court would still find that Plaintiff has failed to dispute Defendant's SUF ¶ 28. At the very least, Plaintiff overstates (or misconstrues) Pieranunzi's testimony. When Pieranunzi was asked if either she or Plaintiff said anything that "was defiant of the suggestions of either Cawley or Smith," Pieranunzi Dep. at 35, Pieranunzi responded that she did not think that she, Pieranunzi, said anything, see id. When asked specifically about whether Plaintiff said anything, Pieranunzi answered that she did not "recall the conversation." Id. at 36.

Lastly, there is also nothing in Plaintiff's Aff. which contradicts or disputes Defendant's SUF ¶ 28. Plaintiff's deposition testimony does not address the question of whether Plaintiff tossed the presentation on the desk. See Plaintiff's Dep. at 240-245. Plaintiff testified that "I tried to appease him and said, 'I'll be happy to take out whatever you want. Tell me what you want me to remove, and I'll try to do that,' and I was trying to appease the man because he was very agitated." Id. at 241.

[11] Cawley's description of this incident appears below:

> Q. And what happened when you told her that?
>
> A. She was visibly upset.
>
> Q. In what way?
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> A. It was my interpretation of her body language and her facial expression that she was really upset that I was asking her to make any changes to the presentation, even though there were still two days before the meeting. In fact, more so than the words was the fact that she tossed the documents in front of me and said you tell me -- along with saying you tell me what you want taken out. She tossed the presentation package in front of me.
>
> Q. Where did it land, on a desk?
>
> A. On a desk.

Cawley Dep. at 158-59.

123. Cawley testified that Plaintiff's reaction surprised him as no one in his twenty-seven years of experience had thrown something in front of him like that and he believed her conduct to be insubordinate. See SUF ¶ 29; Cawley Dep. at 163-164.

After the meeting, Cawley told Smith that the presentation was too busy and had too many slides and that they did not want breakout groups. See SUF ¶ 30. Later that night, Plaintiff telephoned Smith and said: "Bob, what happened, what was that all about?" Plaintiff's Dep. at 246. Smith told her that if Cawley wanted her to shorten the presentation, she should do so. See id.; SUF ¶ 31.

Presentation on June 9

On Friday, June 9, 2000, Plaintiff gave her presentation to the Officers' Strategic Planning Group. See SUF ¶ 32. The presentation was longer than Cawley wanted and Plaintiff did the breakout groups. See id. Because of time constraints and the length of Plaintiff's presentation, towards the end of the breakout session, Cawley got up from the table and announced that there would be no report backs from the breakout session and that lunch would commence. See SUF ¶ 33. Plaintiff testified that Cawley was upset with her presentation when he ended it. See id.

Catherine Rein ("Rein"), Defendant's CEO, was surprised on June 9 when Plaintiff announced a breakout session. See SUF ¶ 34. Prior to the presentation, Cawley had told Rein that he had relayed the information to Plaintiff not to hold any breakout sessions. See id.

After the Presentation

Plaintiff came to work the following Monday, June 12, 2000. See Plaintiff's Aff. ¶ 14. She spoke with Smith and advised him that she was not feeling well and that she was going to work from

home and take personal days for the rest of the week.[12] See Plaintiff's Aff. ¶ 14.

The same day, June 12, Cawley told Smith that he "could not rely upon [Plaintiff] to do what he told her at a high profile environment ... and that he didn't want her to be the project manager on something that would put her in that position," SUF ¶ 36, and that she should be rotated to another position, see id. Smith recommended Plaintiff for a vacant job in the Desktop Life Cycle Management Program under Richard Sitkus ("Sitkus"), and his recommendation was accepted by Cawley. See SUF ¶ 37. Cawley also spoke with Barbara Ridge ("Ridge"), Defendant's Vice President of Human Resources, about Plaintiff on two occasions after June 9 and told her that he was having her rotated into a new position as Plaintiff ignored his instructions to alter her slides and to do away with breakout groups. See SUF ¶ 38.

Plaintiff continued to work from home until June 26, see Plaintiff's Aff. ¶ 14, although on June 22, she met with CEO Rein to discuss mentoring issues, see SUF ¶ 42. On June 26, Plaintiff advised her secretary that she would be working from home because she was still ill. See Plaintiff's Aff. ¶ 15. Smith called Plaintiff at home and told her that she had to come to work or go on disability. See id. Plaintiff explained that she was sick and asked to come in the following day. See id. Smith told Plaintiff that she had to come in that day because there were changes in the department that affected her. See Plaintiff's

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[12] According to Plaintiff, Smith saw her on June 12 and said "I thought you were taking time off ...." Plaintiff's Dep. at 81; see also id. at 84. Plaintiff responded that she was going to take the rest of the week off and asked Smith if that was okay. See id. at 84. Smith said "Yes." Id. Plaintiff testified that she also told Smith she was not feeling well. See id. However, Smith testified that the "only inkling," Smith Dep. at 160, he had that Plaintiff was ill prior to June 26 was based on a comment by an administrative person that "they thought Michele wasn't feeling well," id.

Aff. ¶ 15.

Plaintiff came in to the office and met with Smith, who informed her that her job function was being rotated. See SUF ¶ 43. Smith told her that she was being assigned to Richard Sitkus' area and would be reporting to Joann Kraemer ("Kraemer") on the Desktop Life Cycle Management task. See SUF ¶ 44. Kraemer was a manager two levels below Smith, see Complaint ¶ 49, and the new position was in the technical career band,[13] see Plaintiff's Aff. ¶ 16. The position was not as highly visible as compared with Plaintiff's prior positions which were in the management band. See id. ¶ 4, 16. The salary range for Plaintiff's new position was significantly less than what Plaintiff was earning, see id. ¶ 16, although Plaintiff's salary would not be changed, see SUF ¶ 48; see also Affidavit of Barbara Ridge ("Ridge Aff.") ¶ 4. Plaintiff would not have any managerial or supervisory duties or staff. See Plaintiff's Aff. ¶ 16.

Plaintiff then met with Sitkus, and later with Kraemer, to discuss her new assignment. See SUF ¶ 44. Sitkus informed Plaintiff that he was moving her cubicle closer to him so that all his people could be together. See SUF ¶ 45. The cubicle was smaller, had no windows, and had contained metal furniture. See Plaintiff's Aff. ¶ 17. It had previously been occupied by Chet Kosak, the employee who had been assigned the EDB Project which Plaintiff had previously performed, see Smith Dep. at 141-142. In effect, Plaintiff switched cubicles with the man who replaced

[13] Metropolitan had a program called "career banding" under which there were five bands or groupings of similar jobs. See SUF ¶ 1; Supplemental Statement of Material Disputed Facts ("Supp. SDF") at 1-2. According to Plaintiff, "the vast majority of people who were promoted to officer ... had been previously assigned to the Management band; I am not aware of anyone and I believe that no one or virtually no one from the Technical band had been promoted to officer from 1998-2002." See Plaintiff's Aff. ¶ 4.

her on the EDB Project. See Plaintiff's Aff. ¶ 17. Plaintiff's wood furniture was moved into her new cubicle, even though everyone was going to receive new, uniform furniture in a year. See SUF ¶ 45.

Plaintiff remained at work for the rest of the day. See Plaintiff's Dep. at 94. However, she went on leave after June 26, 2000, and never returned to her new position. See SUF ¶ 47. She was hospitalized on June 29, 2000, and remained so on and off for approximately the next ninety days. See Plaintiff's Dep. at 96. Plaintiff applied for and collected Rhode Island disability benefits from June 29, 2000, to January 27, 2001, as well as workers' compensation benefits because of her colitis. See SUF ¶ 49. She applied for and collected Social Security benefits from December, 2000, retroactive to June, 2000, to at least April of 2003. See id. Plaintiff's application for social security benefits included a statement that she was disabled since June 29, 2000, and unable to work as a result of her colitis and its complications. See SUF ¶ 50.

IV. Travel

Plaintiff filed her Complaint on December 28, 2001. On February 25, 2002, Metropolitan answered the action. The instant Motion for Summary Judgment was filed on September 18, 2003. Plaintiff on December 31, 2003, filed her Objection. A hearing on the Motion was conducted on March 23, 2004. By letter of the same date, the court directed counsel for Plaintiff to file the Supp. SDF. Plaintiff filed her Supp. SDF on April 5, 2004, and thereafter the court took the matter under advisement.

V. Standard of Review

"Summary judgment is appropriate when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to a material fact and that the moving party is

entitled to a judgment as a matter of law.'" Calero-Cerezo v. U.S. Dep't of Justice, 355 F.3d 6, 19 (1st Cir. 2004)(quoting Fed. R. Civ. P. 56(c)). "'A dispute is genuine if the evidence about the fact is such that a reasonable jury could resolve the point in the favor of the non-moving party. A fact is material if it carries with it the potential to affect the outcome of the suit under the applicable law.'" Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 52 (1st Cir. 2000)(quoting Sánchez v. Alvarado, 101 F.3d 223, 227 (1st Cir. 1996)).

In ruling on a motion for summary judgment, the court must examine the record evidence "in the light most favorable to, and drawing all reasonable inferences in favor of, the nonmoving party." Feliciano de la Cruz v. El Conquistador Resort & Country Club, 218 F.3d 1, 5 (1st Cir. 2000)(citing Mulero-Rodriguez v. Ponte, Inc., 98 F.3d 670, 672 (1st Cir. 1996)). "[W]hen the facts support plausible but conflicting inferences on a pivotal issue in the case, the judge may not choose between those inferences at the summary judgment stage." Coyne v. Taber Partners I, 53 F.3d 454, 460 (1st Cir. 1995). Furthermore, "[s]ummary judgment is not appropriate merely because the facts offered by the moving party seem more plausible, or because the opponent is unlikely to prevail at trial. If the evidence presented is subject to conflicting interpretations, or reasonable men might differ as to its significance, summary judgment is improper." Gannon v. Narragansett Elec. Co., 777 F. Supp. 167, 169 (D.R.I. 1991)(citation and internal quotation marks omitted).

Nevertheless, the non-moving party may not rest merely upon the allegations or denials in its pleading, but must set forth specific facts showing that a genuine issue of material fact exists as to each issue upon which it would bear the ultimate burden of proof at trial. See Santiago-Ramos, 217 F.3d at 53

(citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). Moreover, the evidence presented by the nonmoving party "'cannot be conjectural or problematic; it must have substance in the sense that it limns differing versions of the truth which a factfinder must resolve at an ensuing trial.'" Mesnick v. Gen. Elec. Co., 950 F.2d 816, 822 (1st Cir. 1991)(citing Mack v. Great Atl. & Pac. Tea Co., 871 F.2d 179, 181 (1st Cir. 1989)). "Even in employment discrimination cases where elusive concepts such as motive or intent are at issue, summary judgment is appropriate if the non-moving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation." Benoit v. Technical Mfg. Corp., 331 F.3d 166, 173 (1st Cir. 2003)(internal quotation marks omitted); see also Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990); Kriegel v. Rhode Island, 266 F.Supp.2d 288, 294 (D.R.I. 2003).

VI. Discussion

Plaintiff's discrimination and retaliation claims are stated in triplicate. In Counts I, III, and V, she alleges violations of, respectively, the Americans with Disabilities Act ("ADA"), see 42 U.S.C. § 12101 et seq., the Rhode Island Fair Employment Practices Act ("FEPA"), R.I. Gen. Laws § 28-5-1 et seq., and the Rhode Island Civil Rights of Individuals with Handicaps Act ("RICRIHA"), see R.I. Gen. Laws § 42-87-1 et seq. In Counts II, IV, and VI, she alleges violations of those same statutes because of alleged acts of retaliation.

The FEPA, RICRIHA, and ADA are similar statutes. See Rainey v. Town of Warren, 80 F.Supp.2d 5, 8 n.1 (D.R.I. 2000) ("state law claims under FEPA require the same analysis as that utilized for the corresponding federal statutes"); Tardie v. Rehab. Hosp. of Rhode Island, 6 F.Supp.2d 125, 133 (D.R.I. 1998)

("language of the [RICRIHA[14]] closely parallels the language of the ADA"). Therefore, in considering Plaintiff's claims, the court applies the analysis applicable for claims under the ADA.[15] See Kriegel v. Rhode Island, 266 F.Supp.2d 288, 296 (D.R.I. 2003)("Irrespective of which statutory horse he rides, [plaintiff] must traverse the disability discrimination trail, whose contours are best understood by reference to the analysis utilized in the corresponding federal statute, the [ADA].") (citing Tardie v. Rehab. Hosp. of Rhode Island, 6 F.Supp.2d at 132-33 (if summary judgment is granted as to the ADA claim, it should also be granted as to FEPA and RICRIHA claims), aff'd, 168 F.3d 538 (1st Cir.1999)(citing Hodgens v. Gen. Dynamics Corp., 963 F.Supp. 102, 104 (D.R.I. 1997)(all other citations omitted))).

A. Reasonable Accommodation

> The ADA prohibits discrimination in employment against qualified persons with a disability. 42 U.S.C. § 12112(a). Discrimination under the ADA includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless ... the accommodation would impose an undue hardship on the operation of the business." Id. § 12112(b)(5)(A).

Carroll v. Xerox Corp., 294 F.3d 231, 237 (1st Cir. 2002)(alteration in original)(footnote omitted).

In order to avoid summary judgment on her reasonable accommodation claims, Plaintiff must produce enough evidence for a reasonable jury to find that (1) she is disabled within the

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[14] The Rhode Island Civil Rights of Individuals with Handicaps Act ("RICRIHA"), R.I. Gen. Laws § 42-87-1 et seq., is identified as the Rhode Island Civil Rights of People with Disabilities Act in Tardie v. Rehabilitation Hospital of Rhode Island, 6 F.Supp.2d 125, 133 (D.R.I. 1998).

[15] To the extent that the FEPA and the RICRIHA differ from the ADA, such differences do not affect the issues addressed in this Report and Recommendation.

meaning of the ADA, (2) she was able to perform the essential functions of her job with or without a reasonable accommodation, and (3) Metropolitan, despite knowing of Plaintiff's disability did not reasonably accommodate it. See Rocafort v. IBM Corp., 334 F.3d 115, 120 (1st Cir. 2003); Higgens v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 264 (1st Cir. 1999). For purposes of this Report and Recommendation, the court will assume that Plaintiff is able to satisfy the first two requirements of her prima facie case and will focus on the third requirement.[16]

"Under the ADA, the plaintiff bears the burden of proving that the defendant could provide a reasonable accommodation for her disability. At the same time, the statute places the burden on the defendant to show that the proposed accommodation would impose an undue hardship." Reed v. LePage Bakeries, Inc., 244 F.3d 254, 258 (1st Cir. 2001)(citing 42 U.S.C. § 12112(b)(5)(A)); see also García-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638, 648 (1st Cir. 2000)(stating that the burden of showing reasonable accommodation is on the plaintiff). In order for a plaintiff to met her burden she must show not only that the accommodation "would effectively enable her to perform her job," Reed v. LePage Bakeries, Inc., 244 F.3d at 259, but she "must show further ... that her requested accommodation is 'reasonable,'" id. "[T]he concept of reasonableness ... constrains the plaintiff in what she can demand from the defendant." Id. In other words:

> In order to prove "reasonable accommodation," a plaintiff needs to show not only that the proposed accommodation would enable her to perform the essential functions of her job, but also that, at least on the face of things, it is feasible for the employer under the circumstances.

Reed v. LePage Bakeries, Inc., 244 F.3d at 259 (footnote omitted). "A reasonable request for an accommodation must in

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[16] Metropolitan maintains that Plaintiff cannot satisfy any of the elements of her prima facie case. See Defendant's Mem. at 2-8.

some way consider the difficulty or expense imposed on the one doing the accommodating." Reed v. LePage Bakeries, Inc., 244 F.3d at 259.

If the plaintiff is able to make this showing, "the defendant then has the opportunity to show that the proposed accommodation is not as feasible as it appears but rather that there are further costs to be considered, certain devils in the details." Id. Because of the inexactitude of the dividing line between "reasonable accommodation" and "undue hardship," id. at 260, the First Circuit has advised that "wise counsel for both parties will err on the side of offering proof beyond what their burdens require," id.

In addition to the foregoing requirements, the employee's request to her employer for accommodation "must be 'sufficiently direct and specific,' giving notice that she needs a 'special accommodation.'" Id. at 261 (citation omitted). At a minimum, "the request must explain how the accommodation requested is linked to some disability. The employer has no duty to divine the need for a special accommodation where the employee merely makes a mundane request for a change at the workplace." Id.

Plaintiff affirms that she "asked for accommodations in May 1999, in March 2000, and in June 2000 ...." Plaintiff's Aff. ¶ 9. The court examines each of the alleged requests.

1. The May 1999 "Request"

The accommodation which Plaintiff requested in May was for fewer last minute, deadline-driven assignments and more reasonable hours, see SUF ¶ 8, and an adequate staff, see Complaint ¶ 21; Plaintiff's Dep. at 45. Metropolitan has submitted an affidavit from Smith in which he attests that granting these requests would have imposed substantial burdens on the Company and its employees. See Affidavit of Robert Smith ("Smith Aff.") ¶¶ 8-12. According to Smith, "[i]t is an

essential function for any manager at Metropolitan to timely produce all work product within established timeframes." Id. ¶ 9. To lessen some of Plaintiff's time deadlines, Smith states that he would have been forced to assign her work to other managers in his department. See id. ¶ 10. Because all of the managers with positions comparable to Plaintiff's had similar workloads, he affirms that requiring other managers to perform Plaintiff's work, over and above their own duties, would have imposed a substantial burden on Smith's other employees and would have taken time away from their own duties, which were just as crucial to Metropolitan's business as Plaintiff's duties. See id.

With regard to Plaintiff's request for more reasonable hours, Smith attests that he did not require Plaintiff to work after normal business hours, nor did he require her to work weekends. See Smith Aff. ¶ 3. He states that the long hours which she worked were not required by him or anyone else at Metropolitan. See id. ¶ 4. Plaintiff does not dispute this, see SUF ¶ 9,[17] but only says that she "did not work nights and weekends because she wanted to," SDF ¶ 16. The court infers from Plaintiff's statement that she found it impossible to meet the deadlines imposed upon her by Metropolitan unless she worked nights and weekends.

As for staffing, Smith states that Plaintiff was provided adequate staff to perform her duties throughout 1999 and 2000. See Smith Aff. ¶ 8. He notes that in addition to her own staff, Plaintiff had approximately 25-30 other Ease of Doing Business team members throughout the Company to assist her in this initiative, see id., and that as manager on the project she could assign these team members to assist her in performing her job duties on the project, see id. Smith further notes that, when

[17] See Part II. supra at 3-5.

McGuirken left, Plaintiff was provided with the services of another employee. See id. Smith affirms that Plaintiff also requested and received the assistance of Pieranunzi for the June 9, 2000, officers' presentation. See id. Most significantly, Smith further affirms that "[a]ny further staffing assistance, if granted, would have imposed substantial burdens on Metropolitan and its employees." Smith Aff. ¶ 8. This is because "Metropolitan (and [his] department), like any other business, has a finite number of employees and a limited budget. It would have been impossible for [Smith] to assign any other employees to Michele Freadman's projects without causing major disruption of Metropolitan's other business initiatives and/or projects." Id. ¶ 11.

Plaintiff has not shown that "on the face of things," Reed v. LePage Bakeries, Inc., 244 F.3d at 259, that the accommodations which she requested in May of 1999, for fewer assignments with short deadlines and more staff, were reasonable for Metropolitan. She offers no evidence to support her contention in this regard, but simply asserts that the requests were reasonable. See SDF ¶ 19. To be reasonable, a request for an accommodation must in some way consider the difficulty or expense imposed on the one doing the accommodating. See Reed v. LePage Bakeries, Inc., 244 F.3d at 259; see also EEOC v. Amego, Inc., 110 F.3d 135, 148 n.14 (1st Cir. 1997)(listing factors to be considered in determining whether an accommodation would impose an undue hardship under the ADA). Plaintiff's requests do not satisfy this requirement. "An employer is not required to hire additional employees or redistribute essential functions to other employees." Mole v. Buckhorn Rubber Prods., Inc., 165 F.3d 1212, 1218 (1st Cir. 1999).

As Plaintiff was not required by Metropolitan to work the nights and weekends, see SUF ¶ 9; Smith Aff. ¶ 3, her request for

more reasonable hours does not qualify as a request for an accommodation. It is undisputed that the long hours which Plaintiff worked were self imposed. See SUF ¶ 9.[18] While it may be that Plaintiff found it impossible to accomplish her assigned tasks within the span of a normal workday or workweek, she was not required to work beyond that span. In such circumstances, her request for more reasonable hours could only be viewed as a request for less work. Such a request would not be reasonable. Cf. Weiler v. Household Fin. Corp., 101 F.3d 519, 526 (7th Cir. 1996)("Congress intended simply that disabled persons have the same opportunities available to them as are available to nondisabled persons.")(quoting Wernick v. Fed. Reserve Bank of New York, 91 F.3d 379, 384 (2nd Cir. 1996)); Shea v. Tisch, 870 F.2d 786, 790 (1st Cir. 1989)(holding that employer was not required to transfer employee to less stressful location where doing so would violate collective bargaining position).

Moreover, even if these requests could be viewed on their faces as reasonable, Plaintiff has not submitted one scintilla of evidence that her accommodations would not have imposed additional costs or burdens on Metropolitan, see Higgens v. New Balance Athletic Shoe, Inc., 194 F. 3d 252, 264 (1st Cir. 1999) ("[A]n employer who knows of a disability yet fails to make reasonable accommodations violates the statute ... unless it can show that the proposed accommodations would create undue hardship for its business."), nor has Plaintiff offered any evidence that the accommodations would have retained the essential functions of her job and/or allowed her to perform her essential functions. Accordingly, I find that as to the accommodation which Plaintiff requested in May of 1999 (fewer last minute deadlines, more reasonable hours, and an adequate staff), Plaintiff has failed to meet her burden of showing that the requested accommodation was

[18] See Part II. supra at 3-5.

reasonable.

2. The March 2000 "Request"

The court next considers Plaintiff's request for an accommodation in March of 2000. See Plaintiff's Aff. ¶ 9. Plaintiff does not clearly identify this request. There is no reference in the Complaint or in Plaintiff's SDF to a request being made in March, 2000. Although Plaintiff's Aff. states that she made such a request, see Plaintiff's Aff. ¶ 9, the nature of the request is not indicated. The only reference to March, 2000, in Plaintiff's Aff. is to the incident where Smith told Plaintiff that Cawley did not want McGuirken to be replaced.[19] See Plaintiff's Aff. ¶ 11. However, Plaintiff was allowed to hire a replacement for McGuirken, and the replacement worked for Plaintiff until June, 2000. See Plaintiff's Dep. at 68. Thus, as to this request, Plaintiff cannot show that Metropolitan denied her accommodation because the request was granted.

Plaintiff's memorandum contains two references to March, 2000. See Plaintiff's Mem. at 4, 37. In each instance, Plaintiff states that she expressed to Smith "some concerns about her health." Id. Plaintiff cites to page 64 of her deposition as supporting the statement that she expressed these concerns to Smith in March, 2000. See Plaintiff's Mem. at 4, 37. However, the only conversation recounted on page 64 (or pages nearby) in which Plaintiff expressed any concern about her health was the one about her need to have McGuirken replaced. See Plaintiff's Dep. at 64. As noted above, McGuirken was replaced, and thus Plaintiff cannot contend that Metropolitan failed to accommodate this request.

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[19] Plaintiff in her affidavit refers to the conversation with Smith about McGuirken as occurring "[i]n March 1999," Plaintiff's Aff. ¶ 11, however, it is clear from Plaintiff's deposition that the conversation occurred in March of 2000, see Plaintiff's Dep. at 64, 66.

The other conversations between Plaintiff and Smith, which Plaintiff describes on pages 64-66 of her deposition, occurred prior to March, 2000, and those conversations contain only vague statements by Plaintiff that she was being given too much work.[20] See Plaintiff's Dep. at 64-66. Plaintiff does not state that she made any specific request for an accommodation. See id. In one instance, Plaintiff told Smith that she needed help with the "claim integration plan," id. at 65, and that she needed him "to arrange a meeting," id., and that he responded "Just do it. I'm not going to call a meeting. Just do it," id. Even if Plaintiff's statement, "I need you to arrange a meeting," id., could be viewed as a request for an accommodation, it was not connected or linked to Plaintiff's disability. "Under the ADA, requests for accommodation must be express and must be linked to a disability." Estades-Negroni v. Assocs. Corp. of North America, 377 F.3d 58, 64 (1st Cir. 2004). An employee's request must be sufficiently direct and specific to put the employer on notice that she needs a special accommodation. See Calero-Cerezo v. U.S. Dep't of Justice, 355 F.3d 6, 23 (1st Cir. 2004); Reed v. LePage Bakeries, Inc., 244 F.3d 254, 261 (1st Cir. 2001).

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[20] After testifying that she had told Smith prior to March of 2000 that she was being given too much work, see Plaintiff's Dep. at 64, Plaintiff was asked:

> Q. When did these conversations occur?
>
> A. I can't recall specifically, but it could have been when he would ask me, you know, if I could do something else in addition to what else I was doing, and I may have said, you know, I can't do that right now because of such and such.
>
> Q. Okay. And how would he respond to that?
>
> A. Sometimes he would get, you know, somebody else to do it. Other times -- "Well, you know, it won't take you that long. Just do it." Sometimes I would just do it.

Plaintiff's Dep. at 64.

Plaintiff's statements to Smith that he was giving her too much work, or that she needed him to call a meeting, do not constitute requests for accommodation.

Moreover, Plaintiff's implicit argument that it was not necessary for her to make specific reference to her disability when requesting an accommodation from Smith because he knew that she was ill, see SDF ¶ 42,[21] is unpersuasive. See Guzman-Rosario v. United Parcel Serv., 397 F.3d 6, 11-12 (1st Cir. 2005) (describing as doubtful assumption that employee by notifying her supervisor of her condition was implicitly requesting an accommodation); Soileau v. Guilford of Maine, Inc., 105 F.3d 12, 17 n.3 (1st Cir. 1997)("[T]he employer is not put on notice of a present disability merely because an employee some years in the past has taken medical leave ...."); Reed v. LePage Bakeries, Inc., 244 F.3d at 261 ("The employer has no duty to divine the need for a special accommodation where the employee merely makes a mundane request for a change at the workplace."). Accordingly, I find that Plaintiff cannot show that in March of 2000 Metropolitan failed to accommodate a request by her for accommodation.

3. The June 2000 "Requests"

The court now turns to requests which Plaintiff made in June, 2000. Plaintiff argues that she made two requests that month to Smith for a reasonable accommodation, one on June 2, see Plaintiff's Mem. at 30, and the other on June 26, see id. at 31, and that Defendant violated the ADA and FEPA by failing to agree to them, see Plaintiff's Mem. at 31.

a. June 2, 2000, "Request"

[21] Presumably, the basis for Plaintiff's implicit contention that Smith knew that she was ill at the time of these conversations in March, 2000, is the fact that when he visited her at home in May, 1999, she told him that she had ulcerative colitis. See SDF ¶¶ 10, 42.

Addressing first the June 2 request, Plaintiff testified that she made the request during a meeting with Smith in his office. See Plaintiff's Dep. at 70. The meeting was prearranged, and its purpose was to discuss Plaintiff's performance plan, a document prepared on an annual basis which was reviewed, apparently periodically, throughout the year. See id. at 71. The meeting occurred around the same time as Smith was meeting with his other direct reporting subordinates for the same purpose. See id. at 71-72.

It is clear from Plaintiff's deposition testimony that her "request" was not "sufficiently direct and specific," Reed v. LePage Bakeries, Inc., 244 F.3d at 261, to give Smith (and, thereby, Metropolitan) notice that she needed a "special accommodation," id.

> Q. And tell us what you said to him, and what did Mr. Smith say to you during this meeting on June 2?
>
> A. He talked about my performance plans, that he wanted to make sure I was getting credit for all my hard work in Ease of Doing Business, and especially the billing initiative. He wanted to make sure I got credit for that. He said, you know, everything is going great. You're doing excellent, and I told him that I'm working very hard, too hard, and that I needed to take some time off because I'm starting not to feel well, and I told him that some of my symptoms may be returning.
>
> Q. Did you tell him what the symptoms were?
>
> A. No.
>
> MR. SNOW: Okay.
>
> A. But my symptoms in terms of my prior illness, I think he understood, and I had a big presentation that he knew I was working on for next week for the officers, and he said to me, "Just get through the presentation on June 9. Take

> your time off after. Keep it up. You're doing great. Everything is going excellent."
>
> Q. So if I understand your testimony, he didn't say "No, you can't have time off," he said to take the time off after June 9; is that correct?
>
> A. Right, get through the presentation, and then take your time off.

Plaintiff's Dep. at 72-73.

Presumably, Plaintiff's contention is that Smith should have granted Plaintiff time off immediately based on this request, see Plaintiff's Mem. at 31 (arguing that "[i]nstead of accommodating her, Smith told Freadman that she had to first get through the June 9 presentation and then she could take time off."). However, Plaintiff did not tell Smith that she needed to take time off immediately, and such an inference cannot reasonably be drawn from her statement to him. See Reed v. LePage Bakeries, Inc., 244 F.3d at 261 (holding that an employer has no duty to divine need for special accommodation where the employee merely makes a mundane request for a change in the workplace). Moreover, Plaintiff did not adequately link her request to her disability. See id. (requiring such linkage). The vague statement that "some of my symptoms may be returning," Plaintiff's Dep. at 72, was insufficient to reasonably alert Smith that Plaintiff needed any accommodation because of a disability. In addition, the fact that Plaintiff was not certain that her symptoms were returning, as evidenced by her words, "may be returning," makes it doubly unreasonable to find that Plaintiff was requesting an immediate accommodation and that the accommodation was linked to her disability.

Plaintiff faults Defendant for allegedly "utterly fail[ing] to engage in the interactive process." Plaintiff's Mem. at 29; see also id. at 31. However, an "employer's duty to enter into an interactive process typically must be triggered by a

sufficient request for accommodation ...." Reed v. LePage Bakeries, Inc., 244 F.3d at 262 n.11. I find that Plaintiff's June 2 statement that she needed to take time off was not sufficiently specific, direct, and linked to a disability to constitute a request for an accommodation so as to trigger a duty to enter into the interactive process. See Reed v. LePage Bakeries, Inc., 244 F.3d at 262 n.11. Furthermore, if Plaintiff disagreed with Smith's response that Plaintiff could take time off after the June 9 presentation, at the very least Plaintiff was obliged to tell Smith that she could not wait until then and that she needed to take time off immediately. The record is devoid of any such statement by Plaintiff.

b. June 26, 2000, "Request"

Plaintiff's fixes her final request for an accommodation as occurring on June 26, 2000. See Plaintiff's Mem. at 31. She identifies the request as being that she be allowed to continue to work from home. See id. According to Plaintiff, Smith called her on June 26 and told her that she "needed to come into work today ...." Plaintiff's Dep. at 91-92. She told him that she was "still sick," id. at 92, and asked if she could come in the next day, see id. Plaintiff testified that Smith responded, "No, you have to come in the office today. You have two choices. You go out on disability or you come into the office. There's changes in the department that affect you." Plaintiff's Dep. at 92. Plaintiff asked if she could come in the next day, stating "I'm sick," id., but that Smith said "No," id. This request suffers from one of the same deficiencies that was also fatal to the June 2 request. The request did not explain how the accommodation was linked to Plaintiff's disability. See Reed v. LePage Bakeries, Inc., 244 F.3d at 261. Plaintiff merely said that she was "sick," id., giving no indication that her then indisposition was connected to her disability.

Plaintiff asserts that "Smith knew of the severity of Plaintiff's medical condition when she told him[] when he visited her at home ...," SDF ¶ 10, and that "Smith knew that Plaintiff was ill prior to the June 9[, 2000] presentation," SDF ¶ 42. It is not reasonable to infer or conclude that Smith would have known from Plaintiff's June 2 statement that "some of my symptoms may be returning," Plaintiff's Dep. at 72, and her non-specific statement on June 26, 2000, that she was "still sick," id. at 92, that her sickness was connected to her ulcerative colitis as opposed to some other illness and that Plaintiff was requesting an accommodation based on her disability. It is even less reasonable to conclude that Smith would have known on June 26 that Plaintiff's sickness was related to her ulcerative colitis based on comments made to him some thirteen months earlier. Since returning to work, Plaintiff had been almost symptom free since, see Complaint ¶ 36, giving Smith little reason to connect Plaintiff's May, 1999, statements to being sick on June 26, 2000.

Finally, although Plaintiff asserts that her June 26 request was "obviously" a reasonable one, Plaintiff's Mem. at 31, the court disagrees. Plaintiff had not reported for work in Smith's department for two weeks. She had asked Smith on Monday, June 12, if she could take the rest of the week off by taking personal days and by working at home for "a couple of days," Plaintiff's Dep. at 84, and Smith had said yes, see id. However, Plaintiff had continued working at home for more than a week beyond what Smith had authorized, and she had not sought permission for this extension. In light of this, Plaintiff's request that she be allowed to continue to work at home was not on its face reasonable.

Although Plaintiff does not argue that her request to delay her return to the office until June 27 constituted a request for an accommodation, see Plaintiff's Mem. at 31, Smith's alleged

response that Plaintiff either come to the office or go out on disability was not unreasonable. She had not reported for work in his department for two weeks, and her failure to do so had been unauthorized for more than a week. Cf. Hernandez-Torres v. Intercontinental Trading, Inc., 158 F.3d 43, 47 (1st Cir. 1998) (stating that supervisor's admonition that employee complete his work within an eight hour period "or else" does not constitute adverse action). Under the circumstances, Smith's statement was both reasonable and justified.

4. Conclusion Re Reasonable Accommodation

Accordingly, to the extend that Plaintiff's claims in Counts I, III, and V are based on an alleged failure of Metropolitan to grant Plaintiff's requests for reasonable accommodation in May, 1999, March, 2000, and June, 2000, the Motion for Summary Judgment should be granted. I so recommend.

B. Disparate Treatment

To recover under her disparate treatment claims Plaintiff must show (1) that she suffers from a disability or handicap, as defined by the ADA and state law, (2) that she was nevertheless able to perform the essential functions of her job, either with or without reasonable accommodation, and finally (3) that Metropolitan took an adverse employment action against her because of, in whole or in part, her protected disability. See Carroll v. Xerox Corp., 294 F.3d 231, 237 (1st Cir. 2002)(citing Lessard v. Osram Sylvania, Inc., 175 F.3d 193, 197 (1st Cir. 1999)); see also Rossi v. Amica Mut. Ins. Co., No. C.A. 02-485L, 2005 WL 309975, at *4 (D.R.I. Feb. 9, 2005).

The court will again assume for purposes of this Report and Recommendation that Plaintiff has satisfied the first two elements of her prima facie case and will focus upon the third element required for her disparate treatment claim, namely that Metropolitan took adverse action against Plaintiff because of her

disability. See Blackie v. Maine, 75 F.3d 716, 725 (1st Cir. 1996)("[I]n virtually any ... employment discrimination case premised on disparate treatment, it is essential for the plaintiff to show that the employer took a materially adverse employment action against him."). Plaintiff alleges that Metropolitan took adverse action against her in July, 1999, when she returned from medical leave, see Complaint ¶ 72; SDF ¶¶ 21-22, and again in June, 2000, when Plaintiff was allegedly demoted, see Complaint ¶ 72; SDF ¶¶ 27-28.

To be adverse, an action must materially change the conditions of a plaintiff's employment. See Gu v. Boston Police Dep't, 312 F.3d 6, 14 (1st Cir. 2002). "Work places are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action." Blackie v. Maine, 75 F.3d at 725. "A materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities." Marrero v. Goya of Puerto Rico, Inc., 304 F.3d 7, 23 (1st Cir. 2002)(quoting Crady v. Liberty Nat'l Bank & Trust Co., 993 F.2d 132, 136 (7th Cir. 1993))(alteration omitted). "Otherwise every trivial personnel action that an irritable ... employee did not like would form the basis of a discrimination suit." Id. (quoting Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7th Cir.1996))(alteration in original).

"Typically, the employer must either (1) take something of consequence from the employee, say, by discharging or demoting her, reducing her salary, or divesting her of significant responsibilities, or (2) withhold from the employee an accouterment of the employment relationship, say, by failing to follow a customary practice of considering her for promotion

after a particular period of service." Blackie v. Maine, 75 F.3d at 725 (citation omitted); see also id. at 726 (finding alteration of probation officers' status in a way that rendered them ineligible for sixteen percent pay premium constituted a materially adverse taking).

1. July, 1999, Change in Duties

With these principles in mind, the court examines Plaintiff's claim that Metropolitan took adverse employment action against her because of her disability when she returned from medical leave in July, 1999, by changing some of her duties. See Plaintiff's Mem. at 36-37; SDF ¶¶ 21-22. Allegedly, these changes decreased Plaintiff's job opportunities, see Complaint ¶ 72, and made her "more susceptible to lay off," SDF ¶ 22. As the following discussion makes plain, no reasonable jury could find that the change in Plaintiff's duties in July, 1999, constituted a materially adverse change in the terms and conditions of her employment.

Within one month after returning to work, Plaintiff received a salary increase of $5,000, and five and one half months later she received another pay increase of $4,700, see SUF ¶ 18, bringing her salary to $80,000, see id. These pay increases were faster than those given to the average management employee. See Plaintiff's Dep. at 157. Plaintiff also received a bonus of $25,000.00 in 1999, see SUF ¶ 19, an increase of almost fifty percent from the $16,500.00 bonus which Plaintiff had received for 1998, see id. The amount of Plaintiff's bonus was determined by Cawley with input from Smith. See id.

Smith told Plaintiff after she returned from leave that he was "very pleased" with her work. Plaintiff's Dep. at 70. He never criticized her work. See id. In early 2000, Smith gave Plaintiff a performance rating of "5," which was the highest rating available and which was only received by ten percent of

the employees. See SUF ¶ 17. This rating was higher than the rating Plaintiff received before her illness. See id. On May 5, 2000, Plaintiff met with Cawley, and he told Plaintiff she was doing a "great job." See Complaint ¶ 34. On May 6, 2000, Plaintiff received an "outstanding contribution" letter from Cawley for her performance during the prior year. See Complaint ¶ 33. Smith nominated Plaintiff for the Success Planning[22] program in 1999 and 2000, see SUF ¶ 21, and Plaintiff was selected to participate in Success Planning in 2000, see id. Throughout 1999 and up to June, 2000, Plaintiff was asked or selected to give various presentations to several officer or senior management groups. See SUF ¶ 24. During this same period she received a number of laudatory awards, notes, and e-mails from various officers and other supervisors, including Smith, Cawley, and Ted Veazey, the Vice-President for Strategic Planning. See SUF ¶ 22; see also Plaintiff's Dep. at 194-195.

The fact that Plaintiff continued to receive favorable performance evaluations can be significant in determining whether Plaintiff has demonstrated that she suffered an adverse employment action. See Hernandez-Torres v. Intercontinental Trading, Inc., 158 F.3d 43, 47 (1st Cir. 1998). Here, the evidence is overwhelming that the change in Plaintiff's duties in July of 1999 did not constitute adverse employment action.

Although Plaintiff argues that she was "justifiably concerned," Plaintiff's Mem. at 37, because the reassignment of her core duties in performance enhancement, compliance, and training allegedly made her "more susceptible to lay off," SDF ¶ 22, there is no evidence in the record to support this contention. Plaintiff speculates that since the Instrument Panel

[22] Success Planning is a program under which top, high performing non-officer employees with potential are identified and developed. See SUF ¶ 20.

and EDB Project were temporary projects they would not afford her the same security if there were a layoff or downsizing. See Plaintiff's Mem. at 37; see also Plaintiff's Dep. at 58 ("So I was concerned that they had changed my job, and I may not have the same security that I had before."). However, Plaintiff points to no evidence supporting this speculation. Furthermore, Plaintiff was never laid off so her concern was baseless. See Benoit v. Technical Mfg. Corp., 331 F.3d 166, 173 (1st Cir. 2003) (stating that "summary judgment is appropriate if the non-moving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation")(internal quotation marks omitted).

Moreover, while Plaintiff was initially concerned about being assigned Ease of Doing Business because it was then "a little-known, low-profile project," SDF ¶ 21, the project became high profile while she was chairperson, see Plaintiff's Dep. at 111. People commented that the Ease of Doing Business Project "may turn out to be one of the most important things the company had ever done ...." Plaintiff's Dep. at 57. The position was at least as favorable as the position she had held before her illness in March, 1999. See Plaintiff's Dep. at 111; see also SUF ¶ 14. It gave her the opportunity for considerable interaction with senior management of the Company. See Plaintiff's Dep. at 60. After returning to work in July, 1999, Plaintiff made presentations on three or four occasions to the Company's Speed and Direction Committee, which was composed of the CEO and senior management, and on approximately two occasions to the officer group as a whole. See id. at 60-61; see also SUF ¶ 24.

Indeed, Plaintiff's own argument that she suffered an adverse employment action in June, 2000, highlights the fact that Plaintiff did not suffer an adverse employment action when she

returned to work the previous July. Plaintiff states that:

> Prior to June 26, 2000, Freadman had an "important job." She was running both the EDB and Instrumental Panel which were "high visibility projects." On both projects, Freadman had considerable opportunity to interact with senior officers of the company. On both projects, Freadman made presentations to the most influential people in the company – the officer group which included the CEO, Cathy Rein. At least at Freadman's level, exposure to, and interaction with, officers was the way to move up in the company. On these projects, Freadman was very close to the top. On the EDB, she reported directly to Cawley – a Vice President who was just under the CEO; she directly reported to Smith – an Assistant Vice President who was just under Cawley – on everything else. On these projects, Freadman lead [sic] a staff of about forty people and directly supervised four subordinates.

Plaintiff's Mem. at 34-35 (citations omitted).

Plaintiff also cannot show that Metropolitan's explanation for reassigning Plaintiff's core duties, namely that it was necessary to do so while Plaintiff was out on medical leave, see Cawley Dep. at 129, and that the reassignment would allow Plaintiff to have a better work life balance, see Smith Dep. at 63, 152, was pretext for taking adverse action because of her disability.[23] Plaintiff's apparent belief that the actual reason her duties were changed was that Smith, Cawley, and the Company

[23] Plaintiff suggests that Metropolitan cannot justify the July, 1999, change in her duties on the basis of her requests to Smith in May because Smith testified that he did not take any steps to accommodate Plaintiff's colitis when she returned to work and that no accommodations based on disability were given to her. See Plaintiff's Mem. at 31 n.27 (citing Smith's Dep. at 151, 201). However, while Smith testified that he never perceived Plaintiff to have a disability which needed an accommodation, see Smith Dep. at 201, he also made clear that he was concerned about Plaintiff working so many hours and that he wanted her to have "a better work/life balance," id. at 152. Thus, there were two reasons Plaintiff's duties changed in July, 1999. See Smith Dep. at 152. One was that some of Plaintiff's duties had been reassigned to other employees during her absence. See id. The other reason was to "tak[e] some things off [Plaintiff]'s plate to ease her workload a little bit." Id.

"no longer thought that [she] fit the corporate image," Ans. No. 6 at 39; see also Plaintiff's Dep. at 148-149, 150-152, because of her changed physical appearance following her illness,[24] see Ans. No. 6 at 37, and also thought that she "presented a liability to the Company because of potential absences and inability to work extreme hours and deliver top results," id. at 41, is in the realm of "conclusory allegations, improbable inferences, and unsupported speculation," Benoit v. Technical Mfg. Corp., 331 F.3d at 173. Moreover, it is impossible to reconcile Plaintiff's belief with the following facts: after Plaintiff returned from leave, Metropolitan: 1) put her in a position where she became highly visible and had contact with senior management, 2) increased her salary faster than other management employees, 3) substantially increased her bonus over that which she had received in 1998, and 4) nominated her for Success Planning in 1999 and 2000 and selected her to participate in 2000.

In short, I find that Plaintiff has failed to show that the change in her duties in July, 1999, constituted a materially adverse employment action. I also find that she has failed to show that this action was due to unlawful discrimination by Metropolitan because of her protected disability.

2. June, 2000, Change in Duties

With regard to the June, 2000, change in Plaintiff's duties, the court will assume that the change constituted a materially adverse employment action and will proceed directly to the question of whether Plaintiff is able to show that this action

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[24] Plaintiff states that her appearance had changed "dramatically," Ans. to No. 6 at 37, during the four months she was out on medical leave, see id. When she returned to work, she had gained almost twenty pounds, her face was bloated from steroids, her hair was thinning, and she had bald patches. See id. Because of her weight gain, Plaintiff's clothes were too tight and she could not wear the same dress-style shoes she wore before she became ill. See id.

was taken because of, in whole or in part, her protected disability. See Carroll v. Xerox Corp., 294 F.3d 231, 237 (1st Cir. 2002)(stating the three requirements which plaintiff must show to recover under a disparate treatment claim). Regarding this requirement, Plaintiff can point to no plausible evidence that the change was due to her disability.

Plaintiff claims that "the timing of events cannot be ignored," Plaintiff's Mem. at 36, and asserts that "[e]ach time that [Plaintiff] took a medical leave of absence or requested an accommodation, this was met with something adverse," id. However, the court has already determined: 1) that the July, 1999, change in her duties was not an adverse action, 2) that her March, 2000, request for a replacement for McGuirken was granted, and 3) that her June 2, 2000, request for time off did not constitute a request for an accommodation. Thus, the court rejects Plaintiff's argument that it is possible to infer that the June, 2000, reassignment of duties was related to her disability because Metropolitan had previously taken adverse action related to that disability. There is no evidence that Metropolitan took any adverse action against Plaintiff prior to June, 2000, because of, either in whole or part, her disability.

Plaintiff also cites an April 12, 2000, incident where Cawley allegedly embarrassed and demeaned her during a presentation which she was making to a group of senior officers and the CEO. See Plaintiff's Mem. at 38 (citing Plaintiff's 12/11/02 Workers' Compensation Court testimony ("WCC") at 16-22[25]). Although Plaintiff had met with Cawley the day before and given him a dry-run of her presentation, which included showing him the slides she would be using, Cawley announced that a slide which Plaintiff displayed contained old information. See

[25] Additional page citation by the court.

Plaintiff's Mem. at 38. When Plaintiff attempted to explain that it was not an old slide but contained information from a recent focus group, Cawley challenged her and attempted to get another officer present to agree with him. See id. The experience was very upsetting and very unsettling to Plaintiff. See WCC at 20, 21.

Although Plaintiff seemingly contends that this incident and the change in her duties following the June 9, 2000, presentation were connected to her ulcerative colitis, see Plaintiff's Mem. at 38 (addressing Metropolitan's disparate treatment argument, see id. at 31), she fails to articulate any plausible basis for this contention. Indeed, the lack of any connection between the two episodes and Plaintiff's ulcerative colitis is amply demonstrated by the following excerpts from Plaintiff's deposition:

> Q. Do you have any reason to believe that what Mr. Cawley was upset about on June 9, 2000, had anything to do with your ulcerative colitis?
>
> A. Yes.
>
> Q. What?
>
> A. He had done the same thing to me to embarrass me in front of officers at the strategic -- I'm sorry, the Speed and Direction Committee meeting at a prior presentation.
>
> Q. Okay. And that was in April?
>
> A. Yes.
>
> Q. Of 2000?
>
> A. Yes.
>
> Q. Why do you believe that that event had anything to do with the fact that you had ulcerative colitis?
>
> A. Because he did not want me to be promoted.

Q. What do you base that on?

A. The fact that he tried to sabotage me, and set me up every time I had a presentation in front of the officers and the CEO.

Q. What makes you believe that that had anything to do with ulcerative colitis?

A. Because that's the group that nominates you for succession planning, and when I came back to work, he began this pattern of treating me -- either not responding to E-mails or doing that in front of the officers, and then demeaning me before a big presentation.

Plaintiff's Dep. at 121-122.

.....

Q. And other than what you've just testified to -- and I don't want you to repeat yourself, but do you have any other basis to believe that Mr. Cawley's alleged treatment of you was related to your ulcerative colitis?

A. Well, he has made efforts to promote other people that were healthy, and he didn't make any efforts to promote me.

Q. And during the year 2000, what efforts are you aware of that Mr. Cawley undertook to promote other people?

A. He promoted Jan Kovan to officer. He promoted Deb Lee to officer. He helped Ann Foley obtain a job rotation in the marketing department when she was a supervisor in our field claim office, and the fact that according to the succession plan, the people that are nominated are supposed to be developed.

Q. Are you referring to the succession plan or the success plan?

A. The plan in which people are nominated and elected by the officers for performance based opportunities and promotions.

Q. And you know that you were on the year 2000 success plan, don't you?

A. But I was told that I was not on any list when I asked Mr. Smith.

Q. Okay. But you now know that, in fact, you were on the 2000 success plan, isn't that right?

A. Yes.

Q. And that was after you had been ill with ulcerative colitis in 1999, wasn't it?

A. Yes.

Plaintiff's Dep. at 124-125.

As previously discussed, Plaintiff in her answers to interrogatories expressed the belief that Smith and Cawley perceived her as a liability because she could no longer work long hours and produce top results. See Part VI.B.1. supra at 37-38; see also Ans. No. 6 at 41. Presumably, Plaintiff contends that this perception also motivated, at least in part, the change in her duties in June, 2000, although she does not specifically argue this in her memorandum.[26] However, the court has already determined that Plaintiff's belief amounts to nothing more than "conclusory allegations, improbable inferences, and unsupported speculation." See Part VI.B.1. supra at 38 (quoting Benoit v. Technical Mfg. Corp., 331 F.3d 173).

Plaintiff argues that Metropolitan's reasons for the change in her duties following the June 9 presentation were pretextual. See Plaintiff's Mem. at 39. However, the court does not reach the pretext stage unless Plaintiff first establishes a prima facie case of discrimination. See Peele v. Country Mut. Ins.

[26] Plaintiff proceeds directly from arguing that the June, 2000, reassignment was an adverse employment action to asserting that Metropolitan's arguments regarding the issue of pretext are without merit. See Plaintiff's Mem. at 36.

Co., 288 F.3d 319, 326 (7th Cir. 2002); Feliciano de la Cruz v. El Conquistador Resort & Country Club, 218 F.3d 1, 5 (1st Cir. 2000)("Once the plaintiff establishes a prima facie case, the burden shifts to the employer to articulate some 'legitimate, non-discriminatory reason' for its employment action."); Rivera-Garcia v. Ana G. Mendez Univ. System, Civil No. 01-1002 (JAG), 2005 U.S. Dist. LEXIS 3668, at *11 (D.P.R. Mar. 8, 2005)(finding that plaintiff failed to establish a prima facie case); Tardie v. Rehab. Hosp. of Rhode Island, 6 F.Supp.2d 125, 133 (D.R.I. 1998)(stating that "[t]here is no need to discuss burden shifting or employer motivation in this case as plaintiff cannot establish a prima facie case of discrimination"); cf. EEOC v. Amego, Inc., 110 F.3d 135, 142 (1st Cir. 1997)(finding that the plaintiff failed to establish a prima facie case because there was no evidence of any disability based discrimination).

It is true that a prima facie case has been described as a "small showing," Reed v. LePage Bakeries, Inc., 244 F.3d 254, 259 n.3 (1st Cir. 2001), "that is 'not onerous' and is 'easily made,'" Kosereis v. Rhode Island, 331 F.3d 207, 213 (1st Cir. 2003)(internal citations omitted). Here, however, Plaintiff has failed to make even this minimal showing. She has not presented any evidence which would enable a rational jury to find that the reassignment of her duties in June, 2000, was based, either in whole or in part, on her alleged disability.

Even if the court were to reach the issue of pretext, the result would be the same. On the facts of this case, no reasonable juror could find that Metropolitan's legitimate nondiscriminatory reason for changing Plaintiff's duties in June, 2000, was pretextual. It is undisputed that Plaintiff was under the supervision and control of Cawley for the Ease of Doing Business Project and that he had authority to make changes in her presentation, see SUF ¶ 25; that he told her on June 7 to shorten

the presentation, see SUF ¶ 26; that in response to this directive Plaintiff tossed the presentation on the desk and told Cawley to tell her what to take out, see SUF ¶ 28;[27] that the June 9 presentation was longer than Cawley wanted, see SUF ¶ 32; that Cawley was upset with Plaintiff when he ended the presentation, see SUF ¶ 33; Plaintiff's Dep. at 121; and that on Monday, June 12, Cawley told Smith that he did not want Plaintiff to continue as project manager of Ease of Doing Business and to rotate her to another position, see SUF ¶ 36. The inescapable conclusion from the evidence in the record is that Plaintiff's conduct on June 7 and 9, 2000, caused Smith to lose confidence in her and that as a result he no longer wanted her working on the Ease of Doing Business Project. See Cawley Dep. at 180 ("Why she was not going to continue in the prior situation was specifically and explicitly as a result of her conduct on the 7th and the 9th, and I did not want her to continue in that role when I had an issue on whether or not I could rely upon her to do as she was told.").

The fact that Plaintiff disputes that Cawley told her not to do the breakout sessions, see SDF ¶ 31, does not affect the court's determination. Even assuming Cawley did give Plaintiff this instruction, the above facts, which the court has determined are undisputed, provide more than ample justification for Cawley's decision to have Plaintiff rotated to a new position.

Plaintiff argues that she was never told that she was insubordinate and that this omission is evidence of pretext. While the court agrees that in some circumstances such an omission could be indicative of pretext, that is not the case here. The evidence is unrebutted that in the days immediately following June 9, Cawley, Smith, and Ridge had discussions about

[27] See n.12 at 14.

reassigning Plaintiff and the reasons for the reassignment. See Cawley Dep. at 171-172, 174-176; Smith Dep. at 175-177; SUF ¶ 38 ("Cawley spoke with Barbara Ridge, Met's Vice President of Human Resources, about Freadman on two occasions after June 9th and told her that he was having her rotated into a new position as Freadman ignored his instructions to alter her slides and do away with breakout groups. (Ridge Dep., pp. 53-54)"). The close proximity in time of the incidents on June 7 and 9 to the announcement on June 12 by Cawley that Plaintiff should be rotated into another position effectively negates the possibility of pretext.

Plaintiff also argues that Metropolitan did not follow its own policy of progressive discipline. See Plaintiff's Mem. at 39 (citing Cawley Dep. at 42). She contends that according to that policy employees are supposed to be counseled if they do not meet performance goals or if they have engaged in improper conduct. See id. Plaintiff points out that Cawley never counseled her. See id. However, the language of Metropolitan's Human Resources Survival Guide, which deals with performance counseling, states:

> [E]xtreme cases[] such as insubordination ... are individual in nature and circumstance. When extreme cases present themselves, the disposition will be determined after gathering all pertinent information and discussion with appropriate management. When a supervisor becomes aware of an extreme situation, it should be reported to management and/or Human Resources immediately.

Defendant's Reply Memorandum to Plaintiff's Opposition to Defendant's Motion for Summary Judgment ("Defendant's Reply Mem."), Exhibit A (Metlife Auto & Home Human Resources Survival Guide) at 4. Given this language, there was no requirement that Cawley or anyone else counsel Plaintiff regarding her actions or her reassignment. Consequently, Plaintiff has not shown that Metropolitan violated its own policies in reassigning Plaintiff's

duties in June, 2000.

Lastly, courts are not to act as "super personnel departments, assessing the merits--or even the rationality--of employers' nondiscriminatory business decisions." Feliciano de la Cruz v. El Conquistador Resort & Country Club, 218 F.3d 1, 8 (1st Cir. 2000). While Plaintiff characterizes her June, 2000, reassignment as "unjustified ... unreasonable and mak[ing] no sense ...," SDF ¶ 30, in the absence of any evidence showing that it was motivated at least in part by Plaintiff's disability, the court cannot review Metropolitan's decision, cf. Gonzalez v. El Dia, Inc., 304 F.3d 63, 69 (1st Cir. 2002)("[Federal courts] do not 'sit as a super-personnel department that reexamines an entity's business decisions.' 'No matter how medieval a firm's practices, no matter how high-handed its decisional process, no matter how mistaken the firms's managers, [the ADEA does] not interfere.'")(quoting Mechnig v. Sears, Roebuck & Co., 864 F.2d 1359, 1365 (7th Cir. 1988))(alterations in original).

In sum, I find that Plaintiff has failed to show that Metropolitan changed her duties in June, 2000, because of, in whole or in part, her protected disability. Not only has Plaintiff failed to establish a prima facie case of discrimination regarding this reassignment, but she has also failed to present sufficient evidence which would allow a rational jury to find that Metropolitan's explanation for the change in her duties was a pretext for discrimination based on her disability. See Rivera-Garcia v. Ana G. Mendez Univ. System, Civil No. 01-1002 (JAG), 2005 U.S. Dist. LEXIS 3668, at *11 (D.P.R. Mar. 8, 2005)(finding not only that plaintiff failed to establish a prima facie case, but also that he failed to present sufficient evidence that would enable a rational jury to find that his termination for sexual harassment was a pretext for discrimination based on his disability).

3. Conclusion Re Disparate Treatment

Plaintiff cannot establish a prima facie case for her disparate treatment claims based on either the reassignment of her duties in July, 1999, or the change of her duties in June, 2000. Accordingly, the Motion for Summary Judgment should be granted as to those claims, and I so recommend.

C. Retaliation

To establish a prima facie claim of retaliation, Plaintiff must show that: 1) she engaged in protected conduct, 2) she was thereafter subjected to an adverse employment action, and 3) a causal connection existed between the protected conduct and the adverse action. See Wright v. CompUSA, Inc., 352 F.3d 472, 478 (1st Cir. 2003); Che v. Massachusetts Bay Transp. Auth., 342 F.3d 31, 38 (1st Cir. 2003); Gu v. Boston Police Dep't, 312 F.3d 6, 13-14 (1st Cir. 2002); White v. New Hampshire Dep't of Corr., 221 F.3d 254, 262 (1st Cir. 2000). Plaintiff alleges that Metropolitan retaliated against her for requesting a reasonable accommodation for her disability when she returned to work in July, 1999, and for requesting a reasonable accommodation after she became ill in June, 2000. See Complaint ¶ 81. A request for an accommodation is protected activity. See Wright v. CompUSA, 352 F.3d at 478.

1. July 1999 "Retaliation"

Plaintiff contends that Defendant reassigned her duties in retaliation for the accommodation which she had requested of Smith in May. See Plaintiff's SDF ¶ 21; Complaint ¶ 81. As the court has already determined that the July, 1999, change in Plaintiff's duties did not constitute an adverse employment action, see Part VI.B.1. supra at 37-38, Plaintiff cannot establish a prima facie case as to this claim. Therefore, to the extent that Plaintiff's retaliation claims are based on the change in her duties which occurred after she returned from

medical leave, the Motion for Summary Judgment should be granted. I so recommend.

2. June 2000 "Retaliation"

Similarly, the court has already determined that neither Plaintiff's June 2 statement to Smith that she needed to take time off, nor her June 26 request to continue working at home, was sufficiently linked to her disability so as to constitute a request for a reasonable accommodation. See Part VI.A.3. supra at 27-30. Therefore, such requests were not protected activity. Consequently, Plaintiff is unable to satisfy the first element of a prima facie case of retaliation. Even if such requests were considered protected activity, Plaintiff has not shown a causal connection between those requests and the adverse action. Therefore, she also fails to satisfy the third element of her prima facie case. Accordingly, to the extent that her claims of retaliation are based on her June 2 statement that she needed to take time off and her June 26 request to postpone her return to the office, the Motion for Summary Judgment should be granted. I so recommend.

VII. Summary

The Motion should be granted as to Counts I, III, and V. To the extend that the claims of discrimination contained in those counts are based on an alleged failure to grant Plaintiff reasonable accommodation, those claims fail for the reasons stated in Part VI. A. of this Report and Recommendation; to the extent that they are based on alleged disparate treatment, those claims fail for the reasons stated in Part VI. B. The Motion should be also be granted as to the claims of retaliation which are contained in Count II, IV, and VI for the reasons stated in Part VI. C.

VIII. Conclusion

For the reasons stated above, I recommend that the Motion

for Summary Judgment be granted. Any objections to this Report and Recommendation must be specific and must be filed with the Clerk of Court within ten (10) days of its receipt. See Fed. R. Civ. P. 72(b); D.R.I. Local R. 32. Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district court and of the right to appeal the district court's decision. See United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

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DAVID L. MARTIN
United States Magistrate Judge
March 31, 2004